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February 7, 2005

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Pages including this page: 3

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of: Perena

PATENTS

Serial No. 10/056,712

Group Art Unit: 3611

Filed: 01/28/2002

Examiner: Luby

For: WALKING ASSISTANCE DEVICE

REQUEST FOR WITHDRAWAL OF REJECTION

The Supplemental Office Action dated 2/03/2005 is considered to be improper in that there is no provision for such action in the M.P.E.P. or 37 CFR, and applicant requests withdrawal of this Office Action and passage of the application to issue.

Section 1.198 of Title 37 states:

When a decision by the Board of Patent Appeals and Interferences on appeal has become final for judicial review, prosecution of the proceeding before the primary examiner will not be reopened or reconsidered by the primary examiner except under the provisions of § 1.114 or § 41.50 of this title without the written authority of the Director, and then only for the consideration of matters not already adjudicated, sufficient cause being shown.

The M.P.E.P. makes provisions for all possibilities which may occur as a result of a decision by the Board of Patent Appeals and Interferences. The Examiner stated in the above-identified supplemental Office Action that the rejections have been approved by the TC Director as required by M.P.E.P. 1214.04. It will be noted that Section 1214.04 is directed to the situation in which there has been a complete reversal of the Examiner's rejection. Such is not the case here, and M.P.E.P. 1214.04 does not apply.

Rather, Section 1214.06 is seen to be applicable. This section deals with situations wherein the Examiner has been sustained in whole or in part, as is the situation in the present case. This Section covers five possibilities; I. no claims stand allowed, II.

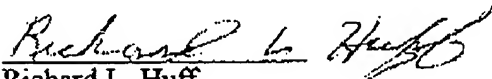
claims stand allowed, III claims require action, IV. 37 CFR 1.196(b) rejection, and V. appeal dismissed. Of these five possibilities, only possibility II applies to the present situation. Subsection II states in part:

The appellant is not required to file a reply. The examiner issues the application or *ex parte* reexamination certificate on the claims which stand allowed. A red-ink line should be drawn through the refused claims and the notion "Board Decision" written in the margin in red ink.

It would seem that the Examiner's options are limited to the activities set forth in Section 1212.06(II) of the M.P.E.P. There is no provision for re-opening of prosecution.

The Examiner is authorized to enter the amendment submitted September 8, 2003. It is believed that the entry of this amendment would place all of the pending claims in condition for allowance.

Respectfully Submitted,


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